

Sheri L. Wainscott

From: Keith R. Powell
Sent: Tuesday, June 10, 2014 10:47 AM
To: Robbie Ferris
Subject: RE: design build finance operate maintain

Got your e-mail. I'll get right back to you. We are discussing your bigger questions as I type.

Keith R. Powell
Childs & Halligan, P.A.
Columbia, South Carolina
www.childs-halligan.com
(803) 254-4035

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Sent: Tuesday, June 10, 2014 2:14 PM
To: Robbie Ferris
Cc: bjeffcoat@popezeigler.com; William F. Halligan
Subject: RE: design build finance operate maint2. Sole Source Procurement

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Keith,

I think you sketching out a direction is exactly what we need right now.

As far as your question goes;

The facilities director (Matt Dean) does not want to run this up the chain of command unless he sees it as viable. He does not want folks to get excited over an opportunity that does not work out. That is why we were hoping that you could help us get the direction set so we could submit a "credible proposal" and then work the details out after the superintendent tells Matt to go with the proposal.

I could be reading this wrong but I think pushing to have them retain you before Matt is ready to present the idea could kill the deal. I am not sure where you stand with this?

I exchanged email with Matt yesterday and he is very enthusiastic about receiving our proposal.

I think we can get this done and set a powerful precedent for SC.

Thanks for your help!

Robbie

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Sent: Tuesday, June 10, 2014 10:47 AM
To: Keith R. Powell
Subject: design build finance operate maintain

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Sheri L. Wainscott

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To: Robbie Ferris
Cc: William F. Halligan; bjeffcoat@popezeigler.com
Subject: RE: design build finance operate maint2. Sole Source Procurement
Attachments: DBOM.doc

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By Act No. 174 of 2008, South Carolina updated the State Procurement Code to expressly authorize the use of design-build-operate-maintain ("DBOM") delivery of infrastructure: "The following project delivery methods are authorized for procurements relating to infrastructure facilities: (a) design-bid-build; (b) construction management at-risk; (c) operations and maintenance; (d) design-build; (e) design-build-operate-maintain; and (f) design-build-finance-operate-maintain." S.C. Code Ann. § 11-35-3005(1).

DBOM is, "a project delivery method in which the governmental body enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the money required to pay for the services provided by the contractor during the contract period are either appropriated by the State before the award of the contract or secured by the State through fare, toll, or user charges." S.C. Code Ann. § 11-35-2910(10).

The entity that performs the DBOM contract is the "DBO Producer," defined as "a person who has been awarded a contract with the State for the design, construction, operation, and maintenance of any infrastructure facility using the design-build-operate-maintain project delivery method defined in Section 11-35-2910(9)." S.C. Reg. § 19-445.2145(A)(4).

A DBOM procurement requires the following procedures, stated in Regulation § 19-445-2145(K):

(1) Content of Request for Proposals. Each request for proposals (RFP) issued by the State for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services shall contain a cover sheet that: (a) confirms that design requirements are included in the RFP, (b) confirms that proposal development documents are solicited in each offeror's response to the RFP, and (c) states the governmental body's determination for that procurement (i) whether offerors must have been prequalified through a previous request for qualifications; (ii) whether the governmental body will select a short list of responsible offerors prior to discussions and evaluations (along with the number of proposals that will be short-listed); and (iii) whether the governmental body will pay stipends to unsuccessful offerors (along with the amount of such stipends and the terms under which stipends will be paid).

(2) Purpose of Design Requirements. The purpose and intent of including design requirements in the RFP is to provide prospective and actual offerors a common, and transparent, written description of the starting point for the competition and to provide the State with the benefit of having responses from competitors that meet the same RFP requirements. In order to be effective, the governmental body must first come to understand and then to communicate its basic requirements for the infrastructure facility to those who are considering whether they will participate in the procurement competition.

(3) Purpose of Requirement for Proposal Development Documents. The purpose and intent of including the requirement for submittal of proposal development documents in each RFP for design-build, design-build-operate-maintain, or design-build-finance-

operate-maintain is to provide actual offerors with a common, and transparent, written description of the finish point for the competition. To be responsive, each offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements).

(4) Content of Request for Proposals: Evaluation Factors. Each request for proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any by listing the required factors in descending order of importance (without numerical weighting), or by listing each factor along with a numerical weight to be associated with that factor in the governmental body's evaluation. Subfactors, if any, must be stated in the RFP and listed, pursuant to the requirements of this Regulation, either in descending order, or with numerical weighting assigned to each subfactor. The purpose and intent of disclosing the relative importance of factors (and subfactors) is to provide transparency to prospective and actual competitors from the date the RFP is first published.

The government may require an operations-period performance bond. S.C. Reg. § 19.445-2145(M). As the American Bar Association's 2000 Model Procurement Code for State and Local Governments official Commentary states, "Design-build-operate-maintain ... contracts will likely require separate forms of security to assure contract performance of infrastructure services that complies with contract requirements and is uninterrupted, even in the event of contractor default." In other words, performance, payment, and operations period security programs should be developed carefully with regard to the needs of the project. Requiring the DBO Producer to, in turn, require performance and payment bonds from its general contractor to cover the initial construction period is therefore advisable.

The Horry County School District Procurement Code is dated January 25, 2008. It therefore predates the State of South Carolina's move to "update" the State Code to the 2000 ABA Model Procurement Code, most comprehensively done with Act No. 174 of 2008. The HCSD Code includes a statement that, "Therefore, to serve the purposes of this Code and to ensure operations are substantially similar to the State Procurement Code, the following specific bidding and contracting procedures are hereby adopted, and are to be interpreted and applied consistent with the interpretations and applications of the parallel and analogous provisions of the South Carolina State Consolidated Procurement Code, including implementing Regulations of the Budget and Control Board, and administrative decisions of the State Procurement Review Panel." HCSD Code art. X(D). The HCSD Code also makes the following commitment, "The method of construction contracting administration used for a District construction project shall be determined to be that method which is most advantageous to the District and will result in the most timely, economical, and successful completion of the construction project." HCSD Code art. X(D)(1).

The HCSD Code currently states that, "All District construction contracts should normally be awarded by competitive sealed bidding except as provided in cases of procurements not exceeding twenty-five thousand dollars (\$25,000), sole-source procurements, or emergency procurements. Competitive sealed proposals (see paragraph c. below) and multi-step sealed bidding shall not be used, except in such cases as may be authorized by the Superintendent" HCSD Code art. X(D)(2)(a).

HCSD Code art. X(D)(2)(c) provides that, "the following types of services or construction may be procured by competitive sealed proposals: ... Design/Build or Lease/Purchase contracts where there must be selection criteria in addition to price [and] construction, where consideration of alternative methods or systems would be advantageous to the District."

HCSD thus has the authority to enter into a DBOM contract, either by: (1) updating its Procurement Code to the current State Model Code for School Districts, which incorporates the express provisions for DBOM;¹ or (2) employing a written determination that justifies the use of DBOM as an "alternative method" under current HCSD Code art. X(D)(2)(c).

The "source selection" method for the "delivery method" of DBOM is, as noted above, through the use of competitive sealed proposals under Regulation § 19-445-2145(K). "Design-build-operate-maintain. Contracts for design-build-operate-maintain must be procured by competitive sealed proposals, as provided in Section 11-35-1530 (Competitive Sealed Proposals)." S.C. Code Ann. § 11-35-3015(6). However, "[c]ontracts for an alternate project delivery method approved pursuant to Section 11-35-3005(2) must be procured by a source selection method provided in Section 11-35-1510, as specified by the authority approving the alternative project delivery method." S.C. Code Ann. § 11-35-3015(8).

Other source selection methods that may be applicable to a construction / infrastructure project are "sole source" and "emergency" source selection. The HCSD Code provisions on sole source procurement are:

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ⁱ http://www.mmo.sc.gov/PS/pol_sub/PS-polsub-school-district-code.phtm S.C. Code Ann. § 11-35-70 and Regulation 19-445.3000 require school districts to have a code "substantially similar" to the State Code.

Sheri L. Wainscott

From: Robbie Ferris <RFerris@sfla.biz>
Sent: Monday, June 16, 2014 12:21 PM
To: Keith R. Powell
Cc: Brenton D. Jeffcoat (bjeffcoat@popezeigler.com)
Subject: RE: design build finance operate maint2. Sole Source Procurement

Keith,
Is there a reason you left the "finance" piece out of this. DO you see DBFOM as not being viable or can you substitute DBFOM for DBOM?
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Subject: RE: design build finance operate maint2. Sole Source Procurement

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Attachments: 20140616133215572.pdf

Here (attached) with official commentary is the 2000 ABA Model Code definitions of these two terms. Act 174 of 2008 (http://www.scstatehouse.gov/sess117_2007-2008/bills/282.htm) begins with this Section 1 that specifically references the Commentary as an interpretive authority:

SECTION 1. The General Assembly finds that:

(1) it adopted a modified version of the 1979 ABA Model Procurement Code for State and Local Governments when it enacted 1981 Act No. 148. Since then, the ABA has revised its recommended model by adopting the 2000 ABA Model Procurement Code for State and Local Governments, which it developed in cooperation with, among others, the National Association of State Procurement Officials, the National Institute of Governmental Purchasing, the American Consulting Engineers Council, the Design Professionals Coalition, the Council on the Federal Procurement of A/E Services, the Engineers Joint Contracts Document Committee, and the National Society of Professional Engineers. One of the primary goals of the revision project was to encourage the competitive use of new forms of project delivery in public construction procurement; and

(2) it is the intent of the General Assembly to facilitate the use of these alternate forms of project delivery by adopting, as modified herein, those portions of the new model code related to Article 5 (Procurement of Infrastructure Facilities and Services) of the model code. To that end, the relevant official comments to the model code, and the construction given to the model code, should be examined as persuasive authority for interpreting and construing the new code provisions created by this act.

As I read it, any public appropriation to acquire the infrastructure facility makes it DBOM. For the purposes of what I gave you earlier, you could just plug in the DBOFM definition in addition to the DBOM. I don't see a difference in how they would be procured.

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- (2) *Design-bid-build* means a project delivery method in which the Purchasing Agency sequentially awards separate contracts, the first for architectural and engineering services to design the project and the second for construction of the project according to the design.

COMMENTARY:

This definition is new to the Code, although design-bid-build is a proven, commonly used public procurement method throughout the United States that was previously authorized under the 1979 Code. Included within the concept of design-bid-build is a widely used variation known as construction management at risk. The Code permits the [State] to elect to employ construction management at risk or design-bid-build, based upon the authority contained in Section 5-202(2)(b).

- (3) *Design-build* means a project delivery method in which the Purchasing Agency enters into a single contract for design and construction of an infrastructure facility.

COMMENTARY:

This definition is new to the Code. Design-build is a productive, competitive alternative to design-bid-build and construction management at risk when the government has established the functional requirements (or design criteria) of a project. The Code defines these "functional requirements" or "design criteria" as "design requirements" in Section 5-101 (6).

- (4) *Design-build-finance-operate-maintain* means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. No [State] funds are appropriated to pay for any part of the services provided by the contractor during the contract period.

COMMENTARY:

(1) This definition is new to the Code. Design-build-finance-operate-maintain is a proven delivery method in common use throughout the world and in American antiquity. Design-build-finance-operate-maintain integrates long-term operation and maintenance, as well as project finance, into a single competition. Design-build-finance-operate-maintain depends on the prior establishment of functional requirements of a project.

(2) Design-build-finance-operate-maintain has characteristics distinct from design-build-operate-maintain as defined in Section 5-101(5). In design-build-finance-operate-maintain, no agency funds are appropriated to pay for any part of the services provided by the contractor during the contract period. This distinction is important in the statutory scheme, since the government's competitive sealed proposal process is structured on the premise that offerings will be required to finance the project, with no expectation of state appropriations. This project delivery method should be carefully and wisely used, since design-build-finance-operate-maintain makes practical sense only where government has made a preliminary determination that project revenues are sufficient, over the length of the proposed contract, to cover design, construction, finance, and operations.

- (5) *Design-build-operate-maintain* means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the funds

required to pay for the services provided by the contractor during the contract period are either appropriated by the [State] prior to award of the contract or secured by the [State] through fare, toll, or user charges.

COMMENTARY:

This definition is new to the Code. Design-build-operate-maintain integrates long-term operation and maintenance into a single competition. Design-build-operate-maintain depends on the prior establishment by the government of the functional requirements of a project. Note the differences in the definition of design-build-operate-maintain from that of design-build-finance-operate-maintain. Projects which are partially or completely funded by direct public appropriations or by publicly imposed user charges, fares, or tolls are defined in the Code as design-build-operate-maintain projects.

- (6) *Design requirements* means the written description of the infrastructure facility or service to be procured under this Article, including:

- (a) required features, functions, characteristics, qualities, and properties that are required by the [State];
- (b) the anticipated schedule, including start, duration, and completion; and
- (c) estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.

The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

COMMENTARY:

(1) This definition is new to the Code. The revised code requires that design requirements be set forth in Requests for Proposals that solicit proposals using the design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 5-201 (1) and 5-202.

(2) The Code flexibly defines design requirements because the specifics of each project vary. Government prepares a functional description that sets forth only the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. The integrated procurement methods - design-build, design-build-operate-maintain, and design-build-finance-operate-maintain - permit the government to use the competitive process to test for higher quality, lower price, and quicker delivery. If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, "design-build" competitions in which major design decisions are already set forth in the design requirements - known in the industry as "detail-build" - are not likely to produce innovation in the integration of design and construction. "Detail-build" procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity.

- (7) *Independent Peer Reviewer Services* are additional architectural and engineering services provided to the [State] in design-build-operate-maintain or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design